

JEAN LOUIS JAYARAJ JOSEPH SELVAM

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v.

GRANT KENYON ECKHARDT SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR

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ABDUL WAHAB SAID AHMAD J

[ORIGINATING SUMMONS NO: D8 (D7)-21-12-2003]

8 MARCH 2006

CIVIL PROCEDURE: *Action - Res judicata - Plaintiff filing series of proceedings in various courts applying for same relief - Whether matters had been litigated and decided upon - Whether an abuse of process - Whether res judicata*

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Selvam Holdings (Malaysia) Sdn Bhd ('the company') in this case was wound up in 1979 and liquidators appointed on that behalf. The plaintiff, the majority shareholder of the company, sought to question the validity of the winding up, and for that purpose filed the originating summons herein applying, *vide* encl. 2 and encl. 5 thereof, for a ruling on the validity of the winding up, on whether the official receiver ought to forward the liquidator's account under the Companies Act 1965 and on whether the company was entitled to commence proceedings against 3rd parties (creditors) without referring to the official receiver. The facts showed, however, that, the present originating summons apart, the plaintiff had also filed similar applications, *albeit* unsuccessfully, in various other courts including the apex court of the country. It was also evident that such of the plaintiff's conduct had been disapproved and censured by some of the judges, *inter alia* for being "highly questionable" and "in breach of natural justice". It was thus that, upon the obtaining facts, a question confronted the learned judge as to whether the issues raised by the plaintiff in the originating summons smacked of *mala fide* and were tainted by *res judicata* and ought to be dismissed.

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Held (dismissing the application):

- (1) The issue whether the company had been wound up is *res judicata* and accordingly the plaintiff's claim in encl. 2 is dismissed with costs. The plaintiff had not raised anything new. What he did was trying to revive his chances of going against the creditors personally, by rewording the prayers. However the prayers may be worded, all he wanted is for the court to say either the company was wound up or not and if it was not wound up whether he could personally bring an action against the creditors (to recover the company's properties). These matters had been litigated and decided upon time and again and the court cannot again delve into the same. (paras 10 & 14)

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- A (2) Enclosure 5, namely the plaintiff's application to bring proceedings against the official receiver is also dismissed with costs. It must be so as the plaintiff had before this filed a plethora of proceedings in various courts on the same issue ever since the 1980's. It is to be observed that all the decisions in those proceedings right to the apex court were not in the plaintiff's favour. On the facts, the court would even go as far as saying that the plaintiff's originating summons here is an abuse of process. (paras 10 & 11)
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- C (3) The plaintiff cannot complain that he was not accorded the right to a fair hearing or that there was a breach of natural justice against him. The plaintiff's act of continuously litigating matters that were already *res judicata* time after time smacked of *mala fide*. Further, habitually filing an action on a matter that was pending determination before another court without informing the relevant parties and the judge concerned is not only highly unjust but constitutes a breach of natural justice. Thus, it was the plaintiff who was guilty of breach of natural justice – not the court, the creditors or anyone else. (para 13)
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- E (4) By virtue of the above, the court finds it unnecessary to answer any of the questions in the plaintiff's originating summons. (para 14)

[Plaintiff's application in encl. 2 and 5 dismissed with costs].

Case(s) referred to:

Selvam Holdings (M) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd [2000] 3 CLJ 16 CA (refd)

Legislation referred to:

Companies Act 1965, ss. 238, 283

Plaintiff in person

For the defendant - B Balakumar; M/s Azim, Tunku Farik & Wong

For the official receiver - En Huzaimi

Reported by Rose Aziz

JUDGMENT

H Abdul Wahab Said Ahmad J:

- I [1] The plaintiff filed this originating summons in encl. 2 for leave to bring the official receiver Kuala Lumpur as a party in this action and to answer the question as to whether Selvam Holdings (Malaysia) Sdn Bhd was wound up within the meaning of the Companies Act and Winding-up Rules. If the answer is positive, the question as to whether the

official receiver has a responsibility to forward a liquidator's account according to s. 238 and 283 of the Companies Act 1965 is to be answered.

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[2] If the answer to the above question is in the negative, then the next question is whether Selvam Holdings (Malaysia) Sdn Bhd was wound up on 19 November 1979. Further, the plaintiff prays for a declaration that the said company was not wound up and that the company is entitled to commence proceedings against the 3rd parties to recover monies and properties without referring to the official receiver. The plaintiff also filed encl. 5, an application to bring a proceeding against the official receiver.

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[3] This case originated from Commercial 7 of the Kuala Lumpur High Court. T Selventhiranathan, the judge in Commercial 7 had recused himself from hearing the case and this case was subsequently transferred to this court. The recusal was because T Selventhiranathan had in his order dated 7 November 1997 in Originating Summons No. D1-14-56-1993 set aside an earlier order by Shaik Daud dated 15 April 1993 in the same file, where Shaik Daud had declared that the winding-up order dated 19 November 1979 (in Companies Winding-Up No. 34 of 1979) was invalid and does not involve the plaintiff company. In the same order, T Selventhiranathan J had granted leave for BSN Commercial to intervene (Affin Bank Berhad had taken over the business of BSN Commercial Bank). T Selventhiranathan J's decision was affirmed by the Court of Appeal. The plaintiff's application for leave to appeal to the Federal Court against T Selventhiranathan J's decision was dismissed by the Federal Court.

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[4] T Selventhiranathan J in his judgment for the D1 originating summons said that when the application was brought before Shaik Daud, the plaintiff did not disclose the fact that the plaintiff had filed similar applications in different courts. They are:

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(a) The 1st action: Originating Summons No. D6-25-42-92:

This action was filed by Selvam Holdings (Malaysia) Sdn Bhd against Toby Lam as receiver and manager and liquidator of Selvam Holdings (Malaysia) Sdn Bhd. Among others the plaintiff prayed for an order that the Winding-Up Order dated 19 November 1979 in Companies Winding Up No. 34-1979 against Selvam Holdings (M) Sdn Bhd does not involve Selvam Holdings (Malaysia) Sdn Bhd. Abdul Hamid bin Mohamad (as he then was) decided on 24 October 1994 that Selvam Holdings (Malaysia) Sdn Bhd and

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- A Selvam Holdings (M) Sdn Bhd are one and the same and that the Winding Up Order dated 19 November 1979 is valid. No appeal was made against this decision.
- (b) The 2nd action: Kuala Lumpur High Court Civil Suit No: D4-22-1244-92:
- B This suit was brought by Esso Productions Malaysia Inc (“EPMI”) against Selvam Holdings (Malaysia) Sdn Bhd because the latter through its solicitors had made a claim on rental of RM347,300 from 1980 even though Selvam Holdings was wound up and rental had been paid to the liquidator.
- C (c) The 3rd action: Kuala Lumpur High Court Originating Summons No. D124-56-93:
- D This is the action where T. Selventhiranathan J gave an order setting aside the order of Shaik Daud. This action was brought by Selvam Holdings (Malaysia) Sdn Bhd and the order was obtained without informing the court of the 1st action and without informing the liquidator and creditors of Selvam Holdings.
- E (d) The 4th action: Shah Alam High Court Originating Summons No. 24-563-94
- F Selvam Holdings (Malaysia) filed this action against Bank Buruh, EPMI and three others, where Selvam Holdings (Malaysia) Sdn Bhd prayed for a declaration and the return of some properties charged to Bank Buruh under the National Land Code 1965. EPMI applied to strike out this action. Abdul Wahab Patail (as he then was) ordered that the application be adjourned *sine die* pending the determination of the other actions filed by Selvam Holdings (Malaysia) Sdn Bhd.
- G (e) The 5th action: Notice of motion filed on 4 October 1994 by Selvam Holdings (Malaysia) Sdn Bhd under Companies Winding Up No. 34-1979 to set aside the winding up order dated 19 November 1979. On 30 December 1995, the 5th Action was adjourned *sine die* by Rahman Hussein pending the decision of the
- H 3rd action. Richard Tallala affirmed Rahmah Hussein J’s decision and transferred the case to Commercial 1, where the third action was heard.
- I [5] Before all the above actions were filed, the plaintiff had filed actions for similar reliefs in Federal Court Civil Appeal No. 89/83, Civil Suit No. F94/82, originating summons F30/84, originating summons F408/84, originating motion F17/84, civil suit F7/84 and originating

summons F31-4147-86. Apart from the above actions, BSN Commercial (previously Bank Buruh and now Affin Bank Berhad) filed a garnishee application to show cause against the plaintiff in Civil Suit No. D2-22-1222-93. The plaintiff as judgment debtor appealed to the Court of Appeal against the decision of Abdul Aziz bin Mohamad on 2 November 1999. In the Court of Appeal, Mokhtar Sidin refused to allow the plaintiff's counsel from submitting. His lordship then went on to dismiss the plaintiff's appeal and ordered the plaintiff to personally pay costs to the defendants.

[6] The plaintiff then filed a series of proceedings against BSN Commercial Bank (now Affin Bank Berhad) applying for the same relief as in the above actions. The plaintiff was however unsuccessful in all the actions. In originating summons No. S3-24-798-1998, Azmel Maamor had dismissed the plaintiff's application and ordered the plaintiff's solicitors and the plaintiff to jointly pay the defendants' costs. In originating summons D1-24-56-1993 Vincent Ng Kim Khoay dismissed the plaintiff's appeal.

[7] Before I heard encl. 2, there was an application in encl. 12 filed by Affin Bank Berhad to intervene and to be made a party to the action. I granted the application.

[8] On the date of hearing of encl. 2 and 5, the plaintiff appeared in person, Mr. Balakumar appeared for the 1st defendant while Mr. Arjit Singh was for Affin Bank Berhad (the 3rd defendant). Mr. Huzaimi appeared for the official receiver. The plaintiff forwarded his written submissions and authorities and the 3rd defendant's counsel submitted and referred to the numerous court decisions involving the plaintiff on the very same issues that are raised here. The 1st defendant's counsel adopted the submissions of the 3rd defendant.

[9] Mr. Huzaimi for the official receiver said that the official receiver is not liable as liquidator of Selvam Holdings (Malaysia) Sdn Bhd. After Selvam Holdings (Malaysia) Sdn Bhd was wound up on 19 November 1979, NH Chan had on 25 August 1981 granted an order that Mr. Francis Chong and Toby Lam from M/s Hanafiah Raslan & Mohamed be appointed as liquidator of Selvam Holdings (Malaysia) Sdn. Bhd. The plaintiff was present in the 1st creditors meeting where the decision to appoint Mr. Francis Chong and Mr. Toby Lam as liquidators was made.

[10] Upon hearing the submission of the parties I find that the issue whether Selvam Holding (Malaysia) Sdn Bhd had been wound up is *res judicata* and I accordingly dismissed the plaintiff's application in encl. 2 with costs. Enclosure 5, the plaintiff's application to bring proceedings

A against the official receiver was also dismissed with costs. I made this
decision after taking into consideration the fact that the plaintiff had
before this filed a plethora of proceedings in various courts on the same
issue since the 1980's until now. All the decisions in those proceedings
right up to the Apex Court are not in the plaintiff's favour. I had given
B the plaintiff ample opportunity to submit on 4 August 2003 and I
postponed the case to 13 September 2005 in order that the official
receiver could appear. On that date, even though plaintiff had submitted
on the previous date, he had insisted on reading out his written
submissions, regurgitating the very same points over years of filing
actions as he went along.
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[11] I would even go as far as saying that the plaintiff's originating
summons is an abuse of process. The behaviour of the plaintiff is best
described by Siti Norma Yaakob JCA (as she then was) in *Selvam
Holdings (M) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd* [2000] 3
D MLJ 16 201:

- (1) The intervenes had established their interest in the outcome
of the originating summons and such interests had not been
disputed. The fact that they had not been cited as parties in
the proceedings and that the 1993 order was obtained
without their knowledge had deprived them of their right to
be heard on their interests. This was a breach of the rules
of natural justice and the 1993 order was a nullity and could
be successfully attached in collateral proceedings *ex debito
justitiae*. *Eu Finance Bhd v. Lim Yok Foo* was followed.
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(2) The conduct of the appellant was most relevant and most
telling. The originating summons was filed whilst the
originating motion was part heard pending decision. Both
summonses sought remedies that had the same effect. The
appellant's behaviour was highly questionable. Under these
circumstances, filing a fresh action to set aside the 1993
order was an exercise in futility as it was counter productive
and it would be adding another suit to an already lost list of
actions relating to the same subject.
(3) Whilst a court is not bound by a decision of another court
exercising concurrent jurisdiction, nonetheless the appellant
was placed in the most anomalous position that there were
two existing and conflicting orders as to their legal status.
Since the appellant had not appealed against both orders, the
intervenes had provided the alternative whereby the
appellant's legal status could be finally resolved. Under these
circumstances, the justice of the case entitled the interveners

to apply to set aside the 1993 order *ex debito justitiae* in the same proceedings in which the 1993 order was made and further the High Court was not *functus officio* to hear and determine such application under its inherent jurisdiction.

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[12] Siti Norma JCA's sentiments were echoed by T Selventhiranathan J when he observed that the plaintiff had a certain *modus operandi* in that he would file applications in courts asking for the same relief, while the same issue is still pending decision in another court. The plaintiff will file the action by stealth in that the necessary parties, such as the creditors are not informed. The creditors would come in only after the plaintiff had obtained the declarations and the orders are served on them. This is aimed at defeating whatever steps that the creditors are taking in realizing the assets of the plaintiff, in execution of their statutory rights as chargees.

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[13] The courts had always been vigilant about upholding justice. The plaintiff cannot complain that he was not accorded the right to a fair hearing or that there was breach of natural justice. The plaintiff's act of continuously litigating matters that are *res judicata* time after time smacks of *mala fide*. Habitually filing an action on a matter that is pending determination before another court without informing the relevant parties and the judge concerned is highly unjust. It deprives the relevant parties from objecting to the application and it does not give the presiding judge a true picture of the situation. I refer to Siti Norma JCA's decision in *Selvam Holdings (M) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd*, where she said: "The fact that they had not been cited as parties in the proceedings and that the 1993 order was obtained without their knowledge had deprived them of their right to be heard on their interests. This was a breach of the rules of natural justice...." Thus it is the plaintiff who is guilty of breach of natural justice, not the court, the creditors, or anyone else.

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[14] In the present case I do not think that I need to delve into the matters that had been litigated and decided upon time and again. The plaintiff had not raised anything new. He is merely trying to revive his chances of going against the creditors personally, by rewording the prayers. However the prayers may be worded, all he wanted is for the court to say either Selvam Holdings (Malaysia) Sdn Bhd was wound up or not and if it is not wound up, whether he could personally bring an action against the creditors (to recover the company's properties). If we look at the list of cases involving the plaintiff and Selvam Holdings (Malaysia) Sdn Bhd, there are cases where the recovery of company property is involved and determined. As for holding the official

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A receiver liable for dereliction of duties, it is crystal clear that the plaintiff was aware since the day that he sat in the first creditors meeting that Mr. Francis Chong and Toby Lam from M/s Hanafiah Raslan & Mohamed were the liquidators.

B **[15]** By virtue of the above I do not find it necessary to answer any of the questions in the plaintiff's originating summons. The plaintiff's application in encl. 2 and encl. 5 is therefore dismissed with costs.

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